



## **SOUTH AFRICA**

by Rika Joubert and Willem van Vollenhoven with  
Johan Beckmann and Justus Prinsloo

Joubert, R., van Vollenhoven, W., Beckmann, J. & Prinsloo, J. (2012). South Africa. In C. L. Glenn & J. De Groof (Eds.), *Balancing freedom, autonomy and accountability in education: Volume 3* (319-345). Tilburg, NL: Wolf Legal Publishers.

### **Overview**

It is common knowledge that South Africa went through a profound transformation in 1994. The transformation and events following in its wake were guided by a new constitution and a new legal framework for every sector of public life, including education. The system is still “far from equilibrium”, which makes describing it very challenging.

The Postscript (under the heading National Unity and Reconciliation) to the Constitution of the Republic of South Africa, Act 200 of 1993 (the so-called “Interim Constitution”) (since repealed by the Constitution of 1996 (Act 108 of 1996) probably articulates the expectations, hopes and fears that South Africans carried into the post 1994 era best:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future

founded on the recognition of human rights, democracy and peaceful co- existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu [*ED: humanity or humanness*] but not for victimisation.

The education sector is also shaped by the subsequent constitution of 1996, education and other relevant legislation, common law and case law as well as by policy. Due to the fact that the Constitution and the suite of laws that accompanied it were to a degree the result of a political compromise and, due to the very nature of compromises, all the laws relevant to education have undergone regular amendments since 1994. They now look significantly different from their original forms. Since 1996 and up to 2009 the Constitution has gone through 19 amendments while the South African Schools Act 84 of 1996 has been amended 8 times since 1996 (and a new set of amendments was approved by Parliament early in 2011).

Prior to 1994, the administrative structures responsible for education in the country were a direct function of the political system which had applied up to that time. Separate education administrations and schools for “Black, Coloureds, Indians and Whites” existed in those areas of the country which had not been cut up into smaller homeland areas, and that separate administrations for education existed in the territories at that time described as Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, Transkei, and Venda. There were therefore fourteen education administrations, some of which had been further subdivided on a provincial basis, giving as many as eighteen education administrations in addition to the administration at national level, which had to be parceled out between the nine provinces which were established after the 1994 elections.

Since 1994, the government has worked to transform all facets of the education system. The fragmented and racially duplicated institutions of the *Apartheid* era have been replaced by a single national system including nine provincial sub- systems. Consistent and persistent efforts are being made to make education structurally accessible to all who were previously denied, or had limited access to it, and thus to

realise the ideal of nine years of compulsory schooling. Marginalised or vulnerable groups have received particular attention in the form of inclusive education programmes. Most recently, “no fee” schools have assisted indigent learners<sup>1</sup> into schools.

Moreover, education financing has been redirected specifically towards considerations of equity, redress, accessibility and affordability. School governance has been decentralised, with greater autonomy devolved onto school governing bodies (including the right to charge fees). Educators’ qualifications have been improved. A new curriculum high on knowledge and skills and based on the values of the *Constitution* has been introduced and streamlined and procedures set in place to monitor educational quality.

The higher education system has been reformed and rationalised, and a new further education and training system is being established. In the space of seventeen years, a far more equitable, efficient and better quality system of education has been created.

Each of the nine provinces has a provincial legislature, which is created in terms of section 104 of the *Constitution of the Republic of South Africa*.<sup>2</sup> The provincial legislature is empowered to pass laws on those matters over which the province exercises either complete or concurrent jurisdiction. It is therefore possible for a provincial legislature to adopt a provincial Act or Acts regulating policy information for, and the provision of, education within the province in question. A highly important function of a provincial education department is that it is responsible for the provision of education in provincial education institutions, as well as for the regulation of those institutions which are not public institutions, excluding institutions for higher education.

South Africa’s political philosophy and goals are reflected in its schools. The enormous political changes which have occurred and equally fundamental social changes which are occurring in the country have faced the schools with daunting challenges, complicated by budgetary limitations.

## *The structure of schooling*

In terms of section 104(1) of the *Constitution* education is a concurrent competence in South Africa, but what is interesting is that only certain aspects of education are described as “concurrent” competences. The provision of schooling is a provincial matter, subject to any norms and standards for the provision of schooling as laid down by the Minister of Basic Education in the national sphere.

The White Paper on Education and Training (Government Notice 196 of 1995) remains the most comprehensive and authoritative articulation of the government's education policy. White Paper presents the values and principles that should, in the view of the then Ministry of Education, drive national policy and these include:

1. The necessity to reconstruct and develop education and training due to the legacy of apartheid. This implies the need for redress of educational inequalities among the sections of the people who have suffered particular disadvantages, or who are especially vulnerable.
2. Education and training are basic human rights. The state has an obligation to protect and advance these rights, so that all citizens irrespective of race, class, gender, creed or age, have the opportunity to develop their capacities and potential, and make their full contribution to the society.
3. Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance.
4. Parents have an inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard for the rights of others and the rights of choice of the growing child.
5. The state has an obligation to provide advice and counseling on education services by all practicable means.
6. The system must increasingly open access to education and training opportunities of good quality, to all children, youth and adults, and provide the means for learners to move easily from one learning context to another, so that the possibilities for lifelong learning are enhanced.
7. The state's resources must be deployed according to the principle of equity, so that they are used to provide essentially the same quality of learning opportunities for all citizens.
8. The principle of democratic governance should increasingly be reflected in every level of the system, by the involvement in consultation and appropriate forms of decision-making of elected representatives of the main stakeholders, interest groups and role players.

9. The creation of a culture of accountability.
10. The active encouragement of mutual respect for people's diverse religious, cultural and language traditions, their right to enjoy and practice these in peace and without hindrance, and the recognition that these are a source of strength for their own communities and the unity of the nation.
11. The education system must counter the legacy of violence
12. The curriculum, teaching methods and textbooks at all levels and in all programmes of education and training, should encourage independent and critical thought.

General education and training is regulated in the first instance in the national sphere by the *South African Schools Act 84 of 1996*. This Act seeks to provide a uniform basis for the provision of schooling in all the public schools of the nation. Provincial education departments may, if they wish, pass additional legislation regulating the operation of schools within their provinces, but in terms of the principle of concurrence these must be consistent with the law in the national sphere.

Education in South Africa can be broken down into the following sectors/bands:<sup>3</sup>

- early childhood development (ECD);
- general education and training (GET), consisting of:
  - grade R to grades one to three (the Foundation Phase)
  - grades four to six (the Intermediate Phase)
  - grades seven to nine (the Senior Phase)
- further education and training (FET), including grades 10 to 12;
- adult basic education and training (ABET);
- special needs education (SNE);
- higher education (HE).

Schooling is compulsory for all children from the year in which they turn seven to the end of the year in which they turn fifteen (or the end of grade nine, whichever comes first).<sup>4</sup> A National Qualifications Framework (NQF) integrates education and training at all levels.

In South Africa in 2010, there were 30,586 established public and registered independent education institutions. Of these, 25,850 were ordinary schools and 4,736 were other education institutions – namely, ECD centres and special schools. In 2010, there were 12,644,208 learners and students in the basic education system, who attended 30,586 education institutions and were served by 439,394 educators.<sup>5</sup>

South Africa's annual education budget is already 22 percent of the total state expenditure which is high compared to other countries where the norm is in the order of 16 percent. Nevertheless, in terms of the population growth and other related educational factors (for example, the state of serious disrepair of physical resources in disadvantaged schools and the uneven teacher qualifications), the potential for increased demands for education is very real and South Africa will most likely not escape the harsh realities of providing mass education with ever diminishing financial resources.<sup>6</sup>

Government's aim has been to restructure the entire education system and overcome its racial, gender and anti-poor bias. But while constitutional imperatives directed the trajectory of change, the chosen policy mechanisms were often the result of intense political contestation between various educational and other interest groups, especially big business and organised labour. Debates on the effectiveness of education policy since 1994 have revolved around whether policy is insufficiently ambitious, given what is seen as an inconsequential emphasis on redress, or insufficiently practical, given historical and economic limitations and incapacities.

Curriculum reform in South Africa has been of a scale arguably unparalleled in the history of curriculum change.<sup>7</sup> Overturning the curriculum of the *Apartheid* government and replacing it with one that supported a human rights- based education was an immediate systemic challenge for the *post-Apartheid* government.

## *The legal framework*

Neither of these *standard* models has been followed by the drafters of the *Constitution*.

Rather they adopted for South Africa a governmental structure that is based on the principle of “co-operative government” under which each *sphere* (not *level*) of

government (national, provincial and local) retains its own unique character but cannot function totally independently of the other spheres; all spheres must participate and co-operate in mutual and reciprocal relationships. No sphere is subordinate to another; it is a federal state without a distinct hierarchy of governmental entities. As stated in the *Constitution* (s 41(1)(h)), all spheres of government must “co-operate with one another in mutual trust and good faith by [among other things] ... (iii) informing one another of and consulting one another on, matters of common interest; [and] (iv) co-coordinating their actions and legislation with one another ....” Education (except higher education) is one of the functional areas enumerated in Schedule 4 of the *Constitution* wherein the national and provincial governments exercise concurrent jurisdiction.<sup>8</sup>

According to Article 29 of the Bill of Rights contained in the *Constitution*, everyone has the right to a basic education, including adult basic education and further education, which the State, through reasonable measures, must make progressively available and accessible. Specifically:

1. Everyone has the right
  - a. to a basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:
  - a. equity;
  - b. practicability; and
  - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:
  - a. do not discriminate on the basis of race;



- b. are registered with the state; and
  - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

## *Legislation governing education*

In the functional area of education, both the national and provincial governments have concurrent jurisdiction. As a result, the national government has adopted a number of statutes, notably the National Education Policy Act (NEPA)(1996) and the South African Schools Act (SASA) (1996).

### *The National Education Policy Act, Act 27 of 1996 (NEPA)*

The National Education Policy Act (NEPA) (1996) was designed to inscribe in law the policies, as well as the legislative and monitoring responsibilities of the Minister of Basic Education, and to formalise the relations between national and provincial authorities. It laid the foundation for the establishment of the Council of Education Ministers (CEM), as well as for the Heads of Education Departments Committee (HEDCOM) as inter-governmental forums to collaborate in developing a new education system. As such, it provides for the formulation of national policies in general and further education and training for, *inter alia*, curriculum, assessment and language policy, as well as quality assurance.<sup>9</sup>

The Act was promulgated to “provide for the determination of national policy for education; to provide afresh for the determination of policy on salaries and conditions of employment of educators; and to provide for matters connected therewith”.

Section 3(3) provides that, subject to the Constitution, national policy shall prevail over the whole or a part of any provincial policy on education if there is a conflict between the national and provincial policies. It is an attempt to regulate conflict that might possibly arise from the concurrent legislative authority of the national and provincial spheres of government.

Section 3(4) provides that, subject to the provisions of subsections (1) to (3), the



[appropriate] Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system. The Minister may determine national policy for among others –

- (a) education management information systems,
- (b) the organisation, management and governance of the national education system;
- (c) facilities, finance and development plans for education,...
- (e) the ratio between educators and students / learners;
- (f) the professional education and accreditation of educators;
- (g) the organisation, management, governance, funding, establishment and registration of educational institutions;
- (h) compulsory school education;
- (i) the admission of students to education institutions, which shall include the determination of the age of admission to schools;...
- (j) curriculum frameworks, core syllabuses and education programmes, learning standards, examinations and the certification of qualifications, subject to the provisions of any law establishing a national qualifications framework or a certifying or accrediting body;
- (k) language in education;
- (n) control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution;
- (o) education support services, including health, welfare, career and vocational development, counselling and guidance for education institutions, within the functional responsibility of a department of education;
- (p) co-operation between the Departments and –
  - (i) other state departments;

- (ii) provincial education departments;
- (iii) local government; and
- (iv) non-government organisations;...
- (r) executive functions required to implement national education policy determined in terms of this Act, including the implementation of measures to address past discriminatory practices.

Section 4 contains directive principles of national education policy echoing in many respects the White Paper 1 of 1995, including:

- (a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament (viii) of every person to use the language and participate in the cultural life of his or her choice within an education institution;
- (b) enabling the education system to contribute to the full personal development of each student, and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes;

Section 5 provides for consultation on national education policy and provides as follows:

1. Policy contemplated in section 3 shall be determined by the Minister after consultation with such appropriate consultative bodies as have been established for that purpose in terms of section 11 or any other applicable law, and with the Council.
2. The policy contemplated in section 3 shall be determined by the Minister with the concurrence of the Minister of Finance in so far as it involves expenditure from the State Revenue Fund.
3. Nothing in this section shall limit the discretion of the Minister to consult whomsoever he or she wishes for advice on the determination of national education policy.

The above-mentioned section 11(1) refers to consultative bodies and provides that the Minister may by regulation establish a body to be known as the National Education and

Training Council (NETC) and other bodies to advise him or her on any matter contemplated in section 3 or any matter identified by the Minister. The NETC has not been established, and its non-establishment seems to militate against the principle of democratic governance.

Section 6 contains provisions regarding consultation on legislation. It provides that: Legislation on a matter referred to in section 3 shall be introduced in Parliament or, in the case of regulations, be published in the *Gazette* only after consultation between the Minister and –

- i. the Council, in respect of education at education institutions; and
- ii. all the parties in the Education Labour Relations Council established by section 40 of the Labour Relations Act, 1995 (Act No. 66 of 1995), in respect of any matter falling within the objectives of that Act.

The fact that legislation shall be introduced only after such consultation is problematic in the sense that the Council with which the minister must consult has not yet been established. There is no compulsion on the minister to establish it. It could also give rise to questions regarding the legality of legislation enacted since the promulgation of this section.

### *The South African Schools Act, Act 84 of 1996 (SASA)*

The South African Schools Act (SASA) (1996) promotes access, quality and democratic governance in the schooling system. It ensures that all learners have right of access to quality education without discrimination, and makes schooling compulsory for children aged 7 to 14. It provides for two types of schools – independent schools and public schools. The provision in the Act for democratic school governance, via school governing bodies, is in place in public schools country-wide. The school funding norms, outlined in SASA, prioritise redress and target poverty with regard to the allocation of funds for the public schooling system. SASA has been amended by *the Education Laws Amendment Act 24 of 2005*, so as to authorise the declaration of schools in poverty stricken areas as “no-fee schools”. No-fee schools are fully subsidized and parents are not required to pay school fees. In 40% of the more affluent public schools parents are still legally obliged to pay school fees.

In brief, as noted in the Preamble, the general purpose of SASA is to establish a new legislative system which sets “uniform norms and standards for the education of

*learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa”.*

In terms of the *South African Schools Act*, a “school” is a public (or independent) school which enrolls learners in one or more grades between Grade zero and twelve. There are two categories of public school: an ordinary public school or a public school for learners with special education needs. In terms of section 15 of this act, a public school is a “juristic person” with the legal capacity to perform its functions in terms of the Act. In terms of its legal personality (a juristic person) the school is a legal subject (like a natural person) and has the capacity to be a bearer of rights and obligations. The public school may enter into a contract with another legal subject (e.g. a company) to purchase textbooks; but it also carries all the responsibilities and liabilities attached to its status (e.g. it is liable in the case of breach of contract).

The *South African Schools Act* distinguishes between *governance* and *professional management*, assigning the former to the governing body and the latter to the principal of the school.<sup>10</sup>

The *South African Schools Act* adopted a model of school governance that devolved significant powers to School Governing Bodies (SGBs).<sup>11</sup> Governing bodies are composed of the school principal and elected representatives of parents, educators, non-teaching staff and (in secondary schools) learners and they may also co-opt non-voting members. Parents have a majority stake in order to ensure that previously marginalized constituencies have a greater voice. Governing bodies are juristic persons with the power to enter into contracts, to sue and be sued.

A basic set of functions is stipulated for SGBs.<sup>12</sup> They are required to:

- develop and adopt a constitution and mission statement for the school;
- determine the admissions policy of the school, subject to certain restrictions;
- administer and control the school’s property, buildings and grounds, including the right to rent them out for fundraising purposes;
- recommend to the Department of Basic Education the appointment of teaching and non-teaching staff;
- develop a budget for the school, which could include schools fees, for approval at a meeting of the parents.

The Further Education and Training Act (1998), Education White Paper 4 on Further Education and Training (1998) and the National Strategy for Further

Education and Training (1999-2001). The latter provides the basis for the development of a nationally coordinated further education and training system, comprising the senior secondary component of schooling and further education and training (FET) colleges. It requires these FET institutions, established in terms of the new legislation, to develop institutional plans, while making provision for programme-based funding, as well as a national curriculum for learning and teaching.<sup>13</sup>

The Higher Education Act (1997) provides for a unified and nationally planned system of higher education. It furthermore gave the green light for a statutory Council on Higher Education (CHE), which advises the Minister while being responsible for quality assurance and promotion.

A whole spectrum of legislation, including the Employment of Educators Act (1998), to regulate the professional, moral and ethical responsibilities of educators, as well as the competency requirements for teachers. The historically divided teaching force is now governed by one Act of Parliament and one professional council – the South African Council of Educators (SACE).

The South African Qualifications Authority (SAQA) Act (1995) provides for the establishment of the National Qualifications Framework (NQF), which constitutes the scaffolding for a national learning system that integrates education and training at all levels. The joint launch of the Human Resources Development Strategy by the Minister of Labour and the Minister of Education on 23 April 2001 reinforces the resolve to establish an integrated education, training and development strategy that will harness the potential of our adult learners.

In 2012 the new framework, The Curriculum Assessment Policy Statement (CAPS) is introduced in schools. The National Curriculum (Grades R to 12) embodies the vision for general education to move away from a racist, apartheid, rote model of learning and teaching, to a liberating, nation-building and learner-centred outcomes-based initiative. In line with training strategies, the reformulation is intended to allow greater mobility between different levels and between institutional sites, as well as to promote the integration of knowledge and skills via learning pathways. Its assessment, qualifications, competency and skills-based framework encourage the development of curriculum models that are aligned to the NQF in theory and practice.

The Education White Paper on Early Childhood Development (2000) provides for the expansion of, and full participation by 5-year-olds in pre-school reception grade education by 2010, as well as for an improvement in the quality of programmes, curricula and teacher development for 0-to-4-year-olds and 6-to-9-year-olds.

Education White Paper 6 on Inclusive Education (2001) explains the intention of the Department of Education to implement inclusive education at all levels in the system by 2020. Such an inclusive system will allow for the inclusion of vulnerable learners and reduce the barriers to learning by means of targeted support structures and mechanisms. This, in turn, will improve the participation and retention levels of learners in the education system, particularly with regard to those learners who are prone to dropping out.

### *Freedom to establish independent schools*

“Independent” schools consist of the private schools established in the previous school system, and of the independent schools that have emerged since the democratic changes. In terms of section 53 of the *South African Schools Act*, former private schools registered under a law regulating school education in South Africa and which existed immediately prior to the commencement of the Schools Act, are deemed to be independent schools.

There are various categories of independent schools, including educational (charitable) trusts, close corporations and companies. The legal status of an independent school will therefore depend on its legal position in terms of the law that regulates its existence: for example, in the case of a company or close corporation, the Companies Act, 1973, or the Close Corporations Act, 1984, respectively, will determine the nature of the school, its rights, obligations and liability in terms of the law. However, over and above these prescriptions, independent schools also function as a category of school within the legal framework of the South African education system and are compelled to adhere to public law provisions (legislation) which regulate overall (national) education norms and standards, as mentioned above. Other forms of state control exist in regard to registration and funding, the registration of educators, educators’ labour relations and regulation by means of provincial legislation.<sup>14</sup>

The ‘dual’ role (legal status) of independent schools in the private and public sector, and the extent of state control where issues such as national education norms and standards, registration and subsidisation, educators’ employment, and the status of the school as an institution or functionary ‘exercising a public power or performing a public function in terms of any legislation’ are at stake, have not yet been resolved and will remain under discussion for some time.<sup>15</sup>

As in most other democratic regimes, ‘independent’ and therefore non-public schools are subject to direct and indirect means of state control, - chiefly through registration and funding. The question inevitably arises, “how private (independent) are private

(independent) schools? Although they have a free choice of the type of education they provide (for example special, religious – or culture – based) they have to meet certain conditions for registration and without registration they cannot (legally) survive.”<sup>16</sup>

Everyone has the right to establish and maintain, at his own expense, independent educational institutions that

- do not discriminate on the basis of race;
- are registered with the state; and
- maintain standards that are not inferior to standards at comparable public educational institutions.

Private educational institutions cannot be used in ways that are inconsistent with the Bill of Rights as enclaves of apartheid and the perpetuation of past privilege.<sup>17</sup>

Subsection 4 confirms that the fact that in terms of subsection 3 these private or independent institutions must be established and maintained at one’s own expense does not preclude the state from subsidising such institutions.

Although the general principle of school choice is not constitutionally recognised, the right to choose between private and public schools is provided for, as well as the right to be educated in a preferred language. Parents’ freedom of choice regarding religious matters has been covered to an extent by providing voluntary religious observances in public institutions.<sup>18</sup>

- Interfaith studies: Children are not only compelled to study religious practices of other faiths. They are forced (in the Learning Area Arts and Culture) to take part in spiritual practices from other cultures. These include song, dance, and rituals of spiritual and erotic nature. One outcome requires creating designs reflecting “nature gods” from various cultures.
- Multiculturalism: Children are compelled to spend much more effort on cultures other than their own and are assessed accordingly. Research on cultural transmission (and the curriculum itself) claims that children will, therefore, adopt little of their own cultures and that a combined “Fusion”-culture will develop.
- Ideological coercion: Throughout the curriculum almost all creative expressions of science and culture must pay homage to the ideologically selected set of prescribed values. Children are forced to interpret almost all projects, analyses, investigations and other work in such a way that it pays



homage to the prescribed value system of the current government.<sup>19</sup>

Although the South African School Act<sup>20</sup> provides for the registration of a learner for education at home, there does not appear to be an express right in this regard. A child may also be exempted from compulsory school attendance for reasons such as long-term illness, severe disability or distance from schools cannot reasonably be expected to attend a school. Such a child must receive an education that meets the minimum requirements of the curriculum and the standard of education in state schools. The parents must also comply with such other reasonable conditions as the education department may set.

### *School choice not limited by family income*

When the South African Schools Act, 1996 came into effect on 1 January 1997, the principal objective of the Act was “to provide for a uniform system for the organisation, governance and funding of schools”. The Act imposes other important responsibilities on the state with respect to the funding of public schools. The basic principles of state funding of public schools derive from the constitutional guarantee of equality and recognition of the right of redress. The Act provides that:

The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in educational provision.<sup>21</sup>

These principles therefore underlie the national norms and minimum standards for public school funding which the Minister of Basic Education is required to determine.<sup>22</sup> The SASA follows the Constitution<sup>23</sup> in establishing the right of any person to establish and maintain an independent school at his or her own cost, and sets out the grounds on which a Provincial Department of Education must register an independent school. The *Constitution* does not preclude state subsidies for independent education institutions.

An important assumption underlying these national norms and standards for school funding is that the national and provincial levels of government will honour the state’s duty, in terms of the Constitution and the SASA, to progressively provide resources to safeguard the right to education of all South Africans. However, educational needs are always greater than the budgetary provision for education. To affect redress and improve equity, therefore, public spending on schools must be specifically targeted to the needs of the poorest. This will apply to both the General Education (grades 1-9) and the Further Education and Training (grades ten to twelve) phases.

New National Norms and Standards for School Funding<sup>24</sup> became national policy in April 1999 and apply uniformly in all provinces. They are aimed at achieving equity in the distribution of resources by progressively redistributing nonpersonnel expenditure to schools. Schools are divided into five categories, based on the country's poverty index. Every year the Minister of Education publishes the National Norms and Standards for School Funding with the updated National Targets Table<sup>25</sup> to include the indicative target amounts allocated to every child in the five poverty quintiles. All learners in quintiles one to three (60 percent of the public school learners nationally) do not have to pay school fees for 2012. Parents of learners attending a quintile four or quintile five schools may apply for exemption of payment of school fees.

The SASA imposes a responsibility on all public school governing bodies to do their utmost to improve the quality of education in their schools by raising additional resources to supplement those which the state provides from public funds.<sup>26</sup> All parents, but particularly those who are less poor or who have good incomes, are thereby encouraged to increase their own direct financial and other contributions to the quality of their children's education in public schools. The Act does not interfere unreasonably with parents' discretion under the law as to how to spend their own resources on their children's education.

According to section 36, the SGB must take all reasonable measures to supplement the funds provided by the state to improve the quality of education, and such measure is to raise school fees which will enable SGB's to supplement the insufficient resources supplied by the State. It is already often noticed that this stipulation causes problems for about 60 percent of the parents of the poorer schools (and approximately 60 percent of South African schools are underprivileged).<sup>27</sup>

One of the roles of the governing body of each school, under section 39 of the law, is to set the level school fees, together with provisions for those parents unable to pay, since "no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body."<sup>28</sup> On the other hand, section 40 provides that "a parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act."

The SASA requires the Minister of Education to make regulations about the equitable criteria and procedures for exemption of parents who are unable to pay school fees.<sup>29</sup> The regulations reflect the national norms in this document, and apply uniformly in all provinces.

The submission that every person can demand from the state the right to have

established schools based on a common culture, language or religion is not supported by the language of section 32 (c). This section does not say that every person has the right to have established, by the State, educational institutions based on such a common culture, language or religion. What is provided is that every person shall have the right to establish such educational institutions. Linguistically and grammatically it provides a defensive right to a person who seeks to establish such educational institutions and it protects that right from invasion by the State, without conferring on the State an obligation to establish such educational institutions.<sup>30</sup>

Thus the government may fund independent schools, but it is not required to do so. The *South African Schools Act*, section 48, carries this logic forward by providing that

1. The Minister may, by notice in the Government Gazette, determine norms and minimum standards for the granting of subsidies to independent schools after consultation with the Council of Education Ministers and the Financial and Fiscal Commission and with the concurrence of the Minister of Finance.
2. The Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school.

Under the *National Norms and Standards for School Funding*, for funding independent schools promulgated by General Notice 2362 of 12 October 1998, an independent school could be considered for subsidy if it is registered by the provincial education authorities;

Certain conditions must be complied with before the Head of Department will register an independent school:

- The standards of the school should not be inferior to those of a comparable public school.
- The admission policy of the school may not discriminate on the grounds of race;
- The school complies with the grounds for registration contemplated in subsection (2);
- The Member of the Executive Council may determine other conditions for registration by notice in the Provincial Gazette;
- The Member of the Executive Council may also by notice in the Provincial

Gazette determine requirements for criteria of eligibility for subsidies, conditions of subsidies and the democratic governance of registered independent schools (article 50 c).

Specific requirements could also touch on the admission of learners at independent schools to examinations conducted by the education departments, the keeping of registers and other documents by the schools. According to this section 50, different requirements may be made in respect of different schools, and affected parties must be allowed a reasonable time to comment on any requirements the Member of the Executive Council of the province intends to determine.

Requirements for public funding include that the school:

- has made an application for funding in the prescribed manner;
- has been operational for one school year;
- is not operated for profit;
- is managed successfully according to a management checklist (see below),
- agrees to unannounced inspection visits by provincial officials; and
- has not been established in direct competition with a nearby uncrowded public school of equivalent quality.

In addition to these conditions, the following conditions applied to independent secondary schools. A secondary school may be considered for subsidy if:

- its grade 12 pass rate is 50% or more of fulltime candidates writing the examination in the prior year;
- the repetition rate in grades 11 or 12 is not more than 20 %;
- it does not engage in practices that are calculated to artificially increase the grade 12 pass rate [such, presumably, as encouraging weaker learners to drop out].

Another form of public subsidy for the choices made by parents has occurred through the provision of the South African Schools Act<sup>31</sup> that an independent school may become a public school, through approval of the provincial education authorities.  
School distinctiveness protected by law and policy

Management at school level is undertaken jointly by the school governing body (SGB) and the School Management Team (SMT), consisting of the principal and senior members of staff. Schools are partially funded by the State and cannot claim unlimited freedom of decision-making in all areas of institutional management, even if they fund that area or a specific service themselves.

As in other countries, it is the provisions of law which define the responsibilities to be exercised at the school level which provide the most scope for educational distinctiveness. The South African Schools Act requires that each individual school have a governing body representing parents, teachers, and community members and (as appropriate) learners, with broad responsibilities:

1. Subject to this Act,<sup>32</sup> the governing body of a public school must
  - (a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;
  - (b) adopt a [school] constitution;
  - (c) develop the mission statement of the school;
  - (d) adopt a code of conduct for learners at the school;
  - (e) support the principal, educators and other staff of the school in the performance of their professional functions;
  - (f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;
  - (g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;
  - (h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;
  - (i) recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 . . .;
  - (j) recommend to the Head of Department the appointment of noneducator staff at the school, subject to the Public Service Act, 1994 . . .;
  - (k) at the request of the Head of Department, allow the reasonable use under fair conditions of the facilities of the school for educational programmes not

conducted by the school . . .

These functions could be summarised as policy making functions: section (1) (a) to (d), motivational functions: section 20 (1) (e) and (h) and organisational tasks: section 20 (1) (f), (g), (i), (j) and (k).

Section 21 of SASA provides also for allocated functions, which SGB's may apply for, - besides the general functions assigned to SGB's. These are chiefly financial management responsibilities,<sup>33</sup> not taken in charge by the state, especially vis- à-vis the previous model C schools which had been self-managing under the apartheid government; they maintained their self-governing status regarding the allocated functions and did not have the choice to apply for the status of ordinary public schools funded in full by the state.

Some observers are concerned that the responsibilities vested in governing boards go well beyond the capability of the parents and staff available in many schools. "Governing a school involves day-to-day management and administration and provincial education departments (and their district agencies) will have a mammoth task in governing and/or monitoring the governance of these schools. The lack of capacity of a governing body to assume responsibility for the governing of the school may also have the potential to exacerbate existing cleavages between privileged and disadvantaged communities."<sup>34</sup>

In recognition of this reality, the South African Schools Act requires that<sup>35</sup>

Out of funds appropriated for this purpose by the provincial legislature, the Head of Department must establish a programme to

- (a) provide introductory training for newly elected governing bodies to enable them to perform their functions; and
- (b) provide continuing training to governing bodies to promote the effective performance of their functions or to enable them to assume additional functions.

## *Distinctive character*

The most difficult aspect of school distinctiveness at present has to do with the language of instruction. The Constitution stipulates that learners have a right to be taught in the (official) language of their choice if practicable.<sup>36</sup> They must inform the school which language they wish to be taught in when applying for admission. Schools, in turn, are expected to take their requests into account and to be seen to be working towards multilingualism.

Nevertheless, it seems that the perspective towards cultural diversity and language rights was sometimes overlooked in the heated atmosphere generated by the dispute over single-medium institutions. There is still an obligation on the state to provide such education where reasonably practicable.<sup>37</sup> In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past racially discriminatory law and practice.”<sup>38</sup>

The South African Schools Act, in turn, provides that “the governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.”<sup>39</sup>

This is by no means a simple matter, or one that has only practical implications. There are strongly emotional arguments for recognizing the nine official African languages as in every respect equal to English and Afrikaans, and for urging White parents to ensure that their children learn at least one African language, as does the Working Group on Values in Education in its recent report. On the other hand, many parents who themselves received a “Bantu education” using an African language believe that this was the result of a deliberate policy to deny them access to opportunities that depend upon strong proficiency in English, and want to ensure that their children are not similarly denied. There are also strong views, among Afrikaners, about the need to ensure that their language does not take second place to English as a common national language.<sup>40</sup>

According to the Language in Education Policy<sup>41</sup>

- only official languages may be used for instruction
- from Grade Three onwards, all learners have to study the language they are taught in and at least one other approved language
- language may not be used as a barrier to admission
- governing bodies must stipulate how their schools are promoting multilingualism
- failing a language will result in failing a grade.<sup>42</sup>



## *Decision about admitting learners*

Government policy on school admissions and school fees is guided by three basic principles:

- Equity: to ensure that government gives the same basic resources to all government schools
- Redress: to give more government resources to learners in historically disadvantaged communities so that they have more money for textbooks and stationery, and it is possible to build schools in areas where none exist and upgrade existing schools
- Access: to make sure no one is excluded from attending school on the basis of race or religion or because they cannot afford to pay school fees.

The South African Schools Act<sup>43</sup> stipulates that “(1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way. (2) The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.”

In terms of sec 9(3) of the Constitution, the admissions policy cannot unfairly discriminate against learners in any way. Therefore an admission policy cannot exclude a learner on the following grounds:<sup>44</sup>

- Nonpayment of school fees or registration fees in previous or current school year His or her parents do not subscribe to the mission statement of the school
- His or her parents have refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of a learner
- The learner has registered late
- His or her parents cannot afford a uniform or school books
- S/he is not a South African citizen.
- Language Disability

- Overcrowding in the school Race, culture, or religion HIV status
- Pregnancy

Only when the provincial offices of the Department of Basic Education determine a school as being full, learners can be refused admission.

The court held in the *Mikro* case that learners' right to language of tuition is not unqualified (Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another, 2005) and that it can only be enforced if a certain number of learners have the need for tuition in a specific language and also if no adequate alternative school exist.<sup>45</sup> In another court case on a similar issue the court held that learners should be admitted as the school was operating on half capacity (Hoërschool Ermelo, 2009). This is in line with the principles of equity, practicality and redress which justify the transformation of the school from a single-medium public school to a parallel-medium public school.

Independent schools cannot be registered (and thus cannot operate legally) if they discriminate in admission on the basis of race.<sup>46</sup>

While public schools may have a distinctive character, and even a religious one, the law stipulates that applicants may not be denied admission “on the grounds that his or her parent does not subscribe to the mission statement of the school”<sup>47</sup> This prohibition “reflects seriously on the ability of the governing body to manage the school according to the needs of the democratically/traditionally accepted ethos of the school.”<sup>48</sup>

## *Decisions about staff*

An amendment to the South African Schools Act, adopted in 1997 expanded the powers of school governing boards by allowing them to employ professional and nonprofessional staff, rather than simply recommending appointments to provincial authorities, but with significant conditions.

An ongoing problem regarding policy on teachers, which is well recognised by the South African authorities, is the lack of a satisfactory database on all aspects of the teaching force. Significant information lacunae exist on demand and supply, retention patterns, mobility, subject shortages and so on. Plans are afoot for a comprehensive electronic database that, when in place, should greatly assist informed policy and planning. The appointment procedures for teachers have been a cause of some concern. Teacher selection is done by the school governing bodies (SGBs), and

it has been suggested that sometimes the SGBs (including parent representatives) may not be well equipped for this role. There have also been complaints of local interests and relationships unduly influencing teacher selection. Proposed appointments are subject to the confirmation of the provincial departments of education, which are the teachers' employer.<sup>49</sup>

The staff must be employed in compliance with the basic values and principles referred to in section 195 of the *Constitution*, and the factors to be taken into account when making appointments include, but are not limited to:

- a) the ability of the candidate;
- b) the principle of equity;
- c) the need to redress past injustices; and
- d) the need for representivity.

In 2006, the Department of Education issued The National Policy Framework for Teacher Education and Development in South Africa. The Framework posits as a starting point the strategic importance of the teacher's role and accepts that teachers "work in extremely complex conditions, largely due to the pervasive legacies of Apartheid, but also as a result of the new policies needed to bring about change in education" (p. 6). The document expresses concern about teacher shortages and the poor image of teaching and commits itself to "an appropriately- pitched recruitment campaign promoting the visibility, attraction and challenge of teaching as a career" (p. 12).

## *Accountability for school quality*

The South African Qualifications Authority (SAQA)<sup>50</sup> was established to oversee the development of the National Qualifications Framework (NQF), covering standard setting and quality assurance. The objectives of the NQF include creating an integrated national framework for learning. Access, mobility and progression are other key objectives, as is the need to enhance quality in education and training. The speedy redress of past discrimination in education, training and employment is another main objective. The NQF will attempt to move the measurement of achievement in education and training away from input towards outcomes.<sup>51</sup>

A new national curriculum framework for schools (Curriculum 2005), based on the concept of "outcome-based education" (OBE), was introduced in Grade One in 1998.

Fourteen years later, in 2010 it became clear that learners produced by this system were not ready to fulfill their place in society and lack basic skills of reading, writing and arithmetic. South Africa was ranked last in the International Mathematics and Science Study (TIMSS) since 1995.<sup>52</sup>

In 2012 the new framework, The Curriculum Assessment Policy Statement (CAPS) is introduced in schools. CAPS is a single, comprehensive, and concise policy document, which will replace the current Subject and Learning Area Statements, Learning Programme Guidelines and Subject Assessment Guidelines for all the subjects listed in the National Curriculum Statement Grades R - 12 (Education, 2012). CAPS for the Intermediate Phase (grades 4 to 6) and Grade 11 will be introduced in all schools in 2013, and already the system is being prepared for this important change to the curriculum. The Department of Basic Education (DBE) is currently orientating hundreds of provincial and district subject advisors, for all subjects, on the changes that will be introduced so that implementation of CAPS in schools is strengthened.

Learners in independent schools are entitled to academic standards not inferior to those in comparable public schools.

## *Teaching of values*

Section 1 of the Constitution sets out the basic values on which the *Constitution* (and consequently the entire South African dispensation) is based. Many experts regard these values as the most significant part of the Constitution which names the following values: human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness. The new human rights culture is based on the founding values in Section 1 which include human dignity, equality, non-racialism and non-sexism, the supreme authority of the Constitution, and the rule of law in South Africa. The South African Schools Act aims at providing one national department enhancing the culture of human rights.

As the first major curriculum statement of a democratic government, it signaled a dramatic break from the past. Despite these noble goals for social and educational change, there is a perception that schools are not assisting in either creating new social values or the skilled population that the country requires in order to compete globally. In part, it must be recognised that education (or even a curriculum) cannot change society or on its own produce national development. Vesting such hopes in education is bound to lead to disillusionment. Education, and getting it right, are

however important because more and better education to a higher level for all is both a good in itself and can create the conditions for enhanced social and personal development.

Another recent report, *Values, Education and Democracy*, issued by the Ministry of Education on behalf of a distinguished working group, assigns to the schools a major role in building societal consensus around a set of goals intended to promote civic peace and cooperation. The recommendations are, as so often, rather unspecific.<sup>53</sup>

There are at least three key elements to an educational philosophy. The first is to develop the intellectual abilities and critical faculties among all of the children and young adults in our schools. Secondly, the educational philosophy of democracy should emphasise inclusiveness. It is equally important to develop a culture and ethos in schools that actively include all learners no matter their background in the formal and informal aspects of a school's life. This requires an enhanced degree of linguistic and cultural dexterity, tolerance and appreciation of difference on the part of teachers and administrators. Thirdly, educational philosophy should provide learners with the tools to solve the many problems that come with being human throughout the life cycle.

The report makes the following recommendations:

- The adoption of a social contract between educators, administrators, parents, trade unions and professional associations based on the values defined in the document.
- Preservice and inservice training of teachers in, educational inequality and the need for equity, an African language, the performing arts.
- The appointment of a panel of historians, archaeologists and human biologists, who would make recommendations regarding, the strengthening of history teaching at schools, the quality of teacher training in history and human biology.
- The introduction of a school based artist in residence programme as a first step towards introducing performing arts programmes at schools.
- The adoption of a tougher policy against illegitimate and harmful discrimination in schools.
- The introduction of schools based debating societies.
- The introduction of a national grid of adult learning opportunities.

- The promotion of social honour and an embrace of South African national symbols.
- Research on the nature and scale of the diversity of our schools' learners and educators.<sup>54</sup>

## *Endnotes*

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<sup>1</sup> In South Africa the term ‘learners’ is used for pupils and students

<sup>2</sup> Act 108 of 1996

<sup>3</sup> OECD, p. 47

<sup>4</sup> S. 5 of South African Schools Act, 1996

<sup>5</sup> Department of Basic Education, 2012

<sup>6</sup> OECD, p. 37

<sup>7</sup> OECD, p. 169

<sup>8</sup> Malherbe, 2005

<sup>9</sup> OECD, 38

<sup>10</sup> S 16(1)

<sup>11</sup> S 16

<sup>12</sup> S 20

<sup>13</sup> OECD, 40

<sup>14</sup> SQUELCH, 84-100, 133-156.

<sup>15</sup> S 239(1)(b)(ii) of the *Constitution*.

<sup>16</sup> See also BRAY (1997) 101.

<sup>17</sup> MALHERBE, 53.

<sup>18</sup> MALHERBE, 53.

<sup>19</sup> [www.pestalozzi.org](http://www.pestalozzi.org)



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<sup>20</sup> S 51

<sup>21</sup> S.34(1).

<sup>22</sup> S 35

<sup>23</sup> S 29(3)

<sup>24</sup> Norms and Standards for School Funding, 1998

<sup>25</sup> Par. 109 of NNSSF

<sup>26</sup> S 36

<sup>27</sup> CONRADIE, 87ff.

<sup>28</sup> S 5.3

<sup>29</sup> S 39 (4)

<sup>30</sup> *In the Matter of the Gauteng Provincial Legislature*, Constitutional Court of South Africa, Judgment no. CCT 3W95, dated 4th April 1996.

<sup>31</sup> S 49

<sup>32</sup> S 20

<sup>33</sup> eg: maintenance and the improvement of the school's property, the purchase of textbooks and other educational material, to pay municipal charges, <sup>1</sup>/<sub>4</sub>

<sup>34</sup> BRAY, 47.

<sup>35</sup> S 19

<sup>36</sup> S 29(2)

<sup>37</sup> MALHERBE (1997), 65.

<sup>38</sup> S 29(2)

<sup>39</sup> S 6(2) of the South African Schools Act

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<sup>40</sup> Department of Education, 1997,

<sup>41</sup> Department of Education, June 1997

<sup>42</sup> [www.gov.za/yearbook/education.htm](http://www.gov.za/yearbook/education.htm)

<sup>43</sup> S 5

<sup>44</sup> South African Schools Act, s. 5

<sup>45</sup> Fleisch & Woolman, 78

<sup>46</sup> S 46 (2) of the Constitution

<sup>47</sup> S 5 (3) of the South African Schools Act

<sup>48</sup> BRAY, 45.

<sup>49</sup> OECD, 302

<sup>50</sup> Section 16A (1) (b) (i) and (ii) of SASA is clear that the principal of a school is accountable for –(i) the academic performance of that school in relation to minimum outcomes and standards and procedures for assessment determined by the Minister in terms of section 6A; and (ii) the effective use of available resources. The principal must also prepare and submit to the appropriate Head of Department an annual report in respect of the above two provisions.

<sup>51</sup> [www.gov.za/yearbook/education.htm](http://www.gov.za/yearbook/education.htm)

<sup>52</sup> Reddy, 91

<sup>53</sup> [education.pwv.gov.za/Policies\\_Reports/Reports\\_2000/Values\\_Edu\\_Demo.pdf](http://education.pwv.gov.za/Policies_Reports/Reports_2000/Values_Edu_Demo.pdf)

<sup>54</sup> [http://education.pwv.gov.za/Policies\\_Reports/reports\\_2000/Values.htm](http://education.pwv.gov.za/Policies_Reports/reports_2000/Values.htm)

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